

REMARKS

Claims 18-24, 26-44 and claims 47-51 are pending. Claims 25 and 52 were canceled in the previous Office Action response mailed April 11, 2007. Claims 18, 22, 23, and 26 are amended without prejudice or disclaimer. Specifically, claim 18 has been amended to recite the "liquid phase" as disclosed in Examples 1-5. Claims 22, 23, and 26 have been amended to remove objected terms as suggested by the Examiner. No new matter is presented by way of cancellation or amendment.

A. Rejection of claims 18-44 and 47-52 under 35 U.S.C. § 112

Claims 22-24, 26-28, 30, 35-44, and 47-49 are rejected under 35 U.S.C. § 112 as assertedly failing to point out and distinctly claim the invention. Applicants respectfully disagree; however, in order to expedite prosecution, claims 22 and 26 have been amended to remove the term "at least," and claim 23 has been amended to recite a grouping of fat soluble vitamins, as suggested by the Examiner. Thus, Applicants respectfully request entry of the amendments and withdrawal of the rejections.

B. Rejection of claims 18-44 and 47-52 under 35 U.S.C. § 103(a)

Claims 18-44 (sic) and 47-52 (sic) are rejected under 35 U.S.C. § 103(a) as being assertedly obvious in light of Schmidt et al. (U.S. Patent No. 4,486,435; hereinafter the '435 patent) in combination with Schmidt (U.S. Patent No. 4,603,143; hereinafter the '143 patent) and Rawlins (U.S. Patent No. 4,719,228; hereinafter

"Rawlins"); or Rawlins in view of the '435 patent or the '228 patent. Applicants respectfully disagree.

First, it is noted that this rejection is the same as the rejection made in the previous office action mailed March 11, 2007; however, Applicants have previously canceled claims 25 and 52 as noted above. Regarding claims 18-24, 26-44, and 47-51, Applicants have previously presented the Declaration of Morris (Sept. 4, 2003, hereinafter the "Declaration of Morris, '03"), which shows that the 40-50 micron range is critical to form a free-flowing powder. Further, Mr. Morris noted that such results are entirely unexpected. As such, the Applicants have met their burden of proof in overcoming a *prima facie* case of obviousness.

Applicants strongly disagree with the characterization of the data in the Declaration of Morris as being "unscientific." Such a characterization of the data is "contrary to logic, reason, and the text" itself...." See *In re Margolis*, 785 F.2d 1029, 228 USPQ 940 (Fed. Cir. 1986) cited in M.P.E.P §716.01(a). Mr. Morris is an expert in his field and the declaration contains scientific data that was collected in the course of a controlled experiment, and, further, the data was submitted under oath. His observations are expert, qualitative, scientific observations and such data is expressly allowed by the courts. See *id.* at 941 where the data consisted of a panel of expert taste testers' opinions on a coffee formulation and the Examiner erred in failing to consider the comparative qualitative data (attached). Thus, the Examiner must review the data for its probative value as required by MPEP § 716.01(c).

In asserting that the "results presented are not evaluated using scientific measuring parameters to show that the properties are patentably distinct and

unexpected” and that “the results such as good, fair, very good, no and yes are merely observations, which are subjective and not ‘scientific’ (Final Office Action, page 5);” the Examiner is making an unsupported assumption without any support in the record which is not allowed by the Federal Circuit or the MPEP. The Federal Circuit has stated that “the Board [i.e., the patent office] cannot simply reach conclusions based on its own understanding or experience—or on its assessment of what would be basic knowledge or common sense. Rather, the Board [i.e., the patent office] must point to some concrete evidence in the record in support of these findings.” See *In re Zurko*, 59 USPQ 2d 1693 (Fed. Cir. 2001). Further, the MPEP indicates that general statements made by the Examiner stating that a declaration is insufficient to overcome a rejection without an explanation supporting such statements are insufficient. See MPEP § 716.01. Thus, the records clearly establish that the Declaration of Morris shows that the 40-50 micron range is critical to form a free-flowing powder since there is no evidence to the contrary.

Further, Applicants have met the burden of showing unexpected results as detailed in MPEP § 716.02(a). In fact, the Examiner does not dispute that Mr. Morris observed that, except in the 40-50 micron range, the compositions were not free flowing. As such, the discovery of Mr. Morris is particularly important because the Examiner has stated that all sizes of silica would be free-flowing. Thus, one of skill in the art would not have predicted that a critical range existed for silica and fat soluble vitamins, much less what the critical range would be. As such, Applicants respectfully request withdrawal of the rejections.

As a further indication that the range of 40-50 microns is critical and is non-obvious, allowed claim 1 of the parent (U.S. Patent No. 6,303,167) of the instant application recites "A method of producing a dry, free-flowing vitamin powder comprising mixing silica and liquid mixed tocopherols, wherein said liquid mixed tocopherols are present in amounts of 65 to about 80 weight percent of said vitamin powder, and wherein said silica has a particle size of between 40 and 50 microns." Since the claims of an issued patent are presumed valid, applicants respectfully submit that the allowed claim is yet a further indication of the criticality of the range of 40-50 microns.

In addition, the Examiner states that Rawlins teaches that Sipernat 50 is free-flowing. This is an incorrect reading of the reference. Rawlins teaches that silica ranging from 10 μ m to 1 mm (including Sipernat 50) in combination with a pharmaceutically active ingredient (i.e., indomethacin, ketazolam, diazepam, digoxin, and 6-cyano-3,4-dihydro-2,2-dimethyl-trans-4-(2-oxo-1-pur-rolidinyl)-2H-benzo[b]pyran-3-ol) is free-flowing, and **does not** disclose or suggest combining silica with a fat soluble vitamin. According to the Examiner, it would be expected from reading Rawlins that all size ranges would work with fat soluble vitamins, but, as the Declaration of Morris shows, only a relatively narrow range is actually suitable for maintaining free-flowability. Thus, without any direction or guidance to the critical claimed range or fat soluble vitamins, Rawlins cannot render obvious (either alone or in combination) a silica particle in the 40-50 micron range which maintains free-flowability when fat soluble vitamin is absorbed at the levels recited in claims 18, 22, 26, and 29 as well as the claims dependent thereon.

The Examiner notes that Aerosil 200 (12 microns) and Aerosil R 972 (16 microns) were both gritty and therefore not free-flowing in the Declaration of Morris. As discussed *supra*, these data confirm that unexpected results occur, because, as stated by the Examiner, "one would assume that 16 micron silica to be better than 12 micron particles." In fact, there is no indication in any of the references that higher loading densities could ever be achieved while maintaining free-flowability at any size. However, Applicants have found that despite the teachings in the art, free-flowability can be achieved for high loading densities at the critical 40-50 micron range. See, the specification of the instant application, paragraph [0020]. Thus, the results are unexpected and the loading density range non-obvious.

The Examiner alleges that the data does not support a range as low as 40 microns; however, Applicants note that the absent evidence to the contrary, such a small variation in size would remain "free-flowing." Since Sipernat 50 has a mean size of 50 microns, the person of ordinary skill in the art would know that some of the sizes are smaller than the mean, but remain free flowing. The data detailed in the Declaration of Morris thus support the claimed range.

A *prima facie* case of obviousness has not and cannot be established since the cited references do not alone, or in combination, teach, suggest, or motivate one of ordinary skill in the art to arrive at all the combinations of elements recited in the instant claims. Specifically, each of independent claims 18, 22, 26, and 29, recite, *inter alia*, elements of silica particle sizes of 40-50 microns AND addition of a starch AND a range of a fat soluble vitamin from 65 to 80 weight percent. As shown in the Declaration of Morris '03, this combination of elements is critical to achieve the free-flowing

compositions having the high loading densities (up to 80%) of fat soluble vitamins. Such elements are not disclosed alone or in combination in any of the cited references. In fact, based on the cited references, one of ordinary skill in the art would not expect that such loading densities are impossible.

A prima facie case has not been established because the cited references only teach low vitamin-load compositions for silica and vitamin E, i.e., 45-60 percent vitamin as noted in the Office Action mailed January 11, 2007. Independent claims 18, 22, 26 and 29 each recite high loading densities (65-80% by weight). The Examiner asserts that 60% loading is disclosed in Rawlins and that this is close enough to make an obviousness rejection. However, Rawlins does not disclose loading densities with a **fat soluble vitamin** or a range of **65-80%**.

In attempting to establish obviousness, the Final Office Action states "Schmidt '143, while disclosing a free flowing, high density, fat-soluble vitamin powder preparation teaches the use of silica of bigger particle sizes (100 microns)." (Final Office Action, page 3.) The Final Office action goes on to state "it would have been obvious to use the silica of bigger particle sizes 40-50 microns in the compositions of Schmidt, et al. '435 or '143 with a reasonable expectation of success, since as evidenced by Rawlins, one can obtain free-flowing powders which have a diameter of between 10 microns to 1 millimeter, in particular 50 microns." (*Id.* at page 4.) However, the applicants respectfully submit that Schmidt '143 actually teaches away from using particle sizes of 40-50 microns. As stated in Schmidt '143, "the use of the described [a minimum length, width, or both of 300 microns] is **essential** to obtaining a free-flowing, fat soluble vitamin." (U.S. Patent No. 4,603,143, col. 1, lines 46-50, emphasis added.)

Thus, applicant respectfully submits that one of ordinary skill in the art would not reasonably expect that the teachings of producing pharmaceutical powders using the silica sizes of Rawlins would work in combination with the teachings of producing vitamin powders of Schmidt '143, stating that a minimum of 300 microns is essential.

Thus, for all of the foregoing reasons presented herein as well as the remarks presented in previous office action responses, there can be no *prima facie* case of obviousness where each and every element of the pending claims is not disclosed, taught or suggested in the cited art. Applicants respectfully request withdrawn of the rejection.

B. Rejection of claims 18-44 and 47-52 under 35 U.S.C. § 103(a)

Claims 18-44 (sic) and 47-52 (sic) are rejected under 35 U.S.C. § 103(a) as being assertedly obvious in light of Schmidt et al. (U.S. Patent No. 4,486,435; hereinafter the '435 patent) in combination with Schmidt (U.S. Patent No. 4,603,143; hereinafter the '143 patent) and Rawlins (U.S. Patent No. 4,719,228; hereinafter "Rawlins"); or Rawlins in view of the '435 patent; or the above-referenced patents disclose alone or in combination; further in view of Drake. Applicants respectfully disagree.

Initially, Applicants note that claims 25 and 52 were previously canceled in the Office Action response mailed April 11, 2007. The remaining claims are non-obvious at least because of the demonstration of a critical range of silica particles at 40-50 microns, and because the *prima facie* case is not met as discussed above.

Furthermore, the additional Drake reference does not remedy the deficiencies of

the previously cited references, either viewed alone or in combination. Drake is used to teach that corn starch can be used to create a more stable powder comprising an enzyme. It does not stand for the proposition that starch increases flowability of oil-silica compositions, nor would one of skill in the art infer that starch would be useful for this reason, as admitted by the Examiner, stating that "the reference is used to support the contention that corn starch extends storage stability . However, Applicants reaffirm that one of skill in the art would not look to the storage stability of dismutase for the formulation chemistry of a fat soluble vitamin, especially where the admixture could affect flowability. Drake does not teach how to use corn starch to improve stability of fat soluble molecules or how such stability can be improved while maintaining the free flowability of fat soluble molecules. Thus, for the foregoing reason, Applicants respectfully request withdrawal of the rejections.

Entry of Amendments

The proposed amendments to claims 18, 22, 23, and 26 should be entered by the Examiner because the amendments are supported by the as-filed specification and do not add any new matter to the application. Further, the proposed amendments do not raise new issues or require a further search. The Proposed amendments should also be entered since they comply with requirements as to form (i.e., they remove 35 U.S.C. § 112 issues), adopt suggestions of the Examiner, and thus, should place the application in condition for allowance. If the Examiner determines that the amendments do not place the application in condition for allowance, entry is respectfully requested since they remove issues for appeal.

Conclusion

For at least the reasons discussed above, Applicants respectfully request reconsideration of the rejections and allowance of the claims.

If the undersigned can be of assistance to the Examiner in addressing issues to advance the application to allowance, please contact the undersigned at the number set forth below. Applicants submit that the enclosed fee necessary for consideration of this *Response* is sufficient. Nevertheless, the Commissioner is hereby authorized to charge any additionally required fees deemed necessary for consideration of this *Response* to Account No. 11-1110.

Respectfully submitted,

9/21/07
Date

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"keep a safe distance from the margin line." If, as he also says, the decision nevertheless is to sail in close to the shoal, or skate where the ice is thin, "it is the responsibility of the alleged contemnor to insure that the court can make the requisite comparison — the accused activity with the alleged justification. There is no clear justification here because there is no clear evidence of just what advice was given to Magna-Graphics." We believe future patent litigation will include many alleged infringers who will not have been already under injunction, or will be able to produce a record that they disclosed their specific intention to knowledgeable advisers and obtained assurance they would not incur and excessive risk of contempt charges. Accordingly, this case will not constitute a precedent that all infringements are willful.

In its decision and order appealed from, the court denied a motion by Paper Converting for counsel fees, finding its treble damage award "adequate under the circumstances." Paper Converting has not cross-appealed as to this, so no claim for counsel fees is before us now. We note, however, that there is no necessary inconsistency between awarding treble damages on account of willful infringement and denying counsel fees whether or not the case is deemed "exceptional." The reasons for this are explained in *S. C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 228 USPQ 367, Nos. 85-2191, 85-2287 (Fed. Cir. Jan. 8, 1986).

Conclusion

The judgment appealed from, as reinstated by the decision and order of May 30, 1985, is **AFFIRMED**.

Nies, Circuit Judge, dissenting.

It will come as no surprise that I dissent to the trebling of damages with respect to the Fort Howard machine since I continue to believe there was no infringement in assembling and testing less than the complete claimed invention. However, looking only at the damage issue, I cannot agree that Magna-Graphic's infringement was willful because it obtained insufficient advice from counsel. The district court states that "[a]ll that [counsel] was clear on was that Magna-Graphics should not test with the completed assembly." In the court's view it follows that the question of infringement by less than a complete assembly was left open, a question on which a reasonable person would have sought additional advice.

In my view, counsel's testimony with respect to his advice was not so limited. No advice was

needed that a complete assembly would infringe (whether or not testing was done). The import of *Deepsouth*, the case he discussed with them, is not that complete assembly infringes but that an incomplete assembly does not infringe. The district court converted meaningful advice given to a client who was in danger of contempt into empty conversation.

Because Magna-Graphics acted in accordance with advice of counsel that was reasonable at the time it was given, I would reverse.

Court of Appeals, Federal Circuit

In re Margolis, et al.

No. 85-2616

Decided March 7, 1986

PATENTS

1. Patentability — Aggregation or combination — New or better result (\$51.157)

Patent Office erred in rejecting applicants' coffee processing claims for obviousness as based solely upon prior art, without considering, as evidence of invention's unexpected results, data in specification comparing coffee made by claimed oxygen-free process with coffee produced without removal of oxygen.

Appeal from Patent and Trademark Office Board of Patent Appeals and Interferences.

Application for patent of Geoffrey Margolis, Alain Mercier, and Klaus Schlecht, application, Serial No. 297,324. From decision affirming examiner's rejection of claims 1-8, applicants appeal. Vacated and remanded.

William H. Vogt, III, and Vogt & O'Donnell, both of White Plains, N.Y. (Glenn E. Karta, of counsel) for appellants.

Robert D. Edmonds, Associate Solicitor (Joseph F. Nakamura, Solicitor, and Fred E. McKelvey, Deputy Solicitor, on the brief) for Patent and Trademark Office.

Before Markey, Chief Judge, and Smith and Newman, Circuit Judges.

Newman, Circuit Judge.

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Appeals, Federal Circuit

In re Margolis, et al.

No. 85-2616

Decided March 7, 1986

Utility — Aggregation or combi-
— New or better result
7)

The court erred in rejecting applicants'
missing claims for obviousness as
upon prior art, without consider-
ation of invention's unexpected re-
sult in specification comparing coffee
aimed oxygen-free process with
iced without removal of oxygen.

From Patent and Trademark Office
Interferential Appeals and Interferences.

On for patent of Geoffrey Margolis,
Mercier, and Klaus Schlecht, appli-
cations No. 297,324. From decision af-
firming rejection of claims 1-8,
appeal. Vacated and remanded.

Vogt, III, and Vogt & O'Donnell
White Plains, N.Y. (Glenn E.
counsel) for appellants.

Edmonds, Associate Solicitor (Jo-
Nakamura, Solicitor, and Fred E.
ey, Deputy Solicitor, on the brief)
Patent and Trademark Office.

Markey, Chief Judge, and Smith and
n, Circuit Judges.

n, Circuit Judge.

Patent applicants Geoffrey Margolis, Alain
Mercier, and Klaus Schlecht (hereinafter
Margolis), assignors to Nestec, S.A., appeal
the decision of the Patent and Trademark
Office (PTO) Board of Patent Appeals and
Interferences (the Board), that affirmed the
rejection of claims 1 through 8 of patent appli-
cation Serial No. 297,324 on the ground that
the claimed invention would have been obvious
under 35 U.S.C. §103. We vacate the decision
and remand to the PTO.

Opinion

The claimed invention relates to the manu-
facture of soluble coffee, and is described as
providing improved flavor retention without
loss of yield. Claim 1 describes the process:

1. Process for extracting roasted and
ground coffee comprising wetting, in the
absence of oxygen, roasted and ground cof-
fee having an average particle size not ex-
ceeding 2.0 mm, with at least twice its
weight of an aqueous liquid, transferring
the wetted coffee, out of contact with oxy-
gen, to an extractor and extracting the coffee
with an aqueous liquid at a temperature of
at least 100°C.

Claims 2 through 8 were not argued separa-
tely, and need not be separately considered. *In re*
Sernaker, 702 F.2d 989, 991, 217 USPQ 1, 3
(Fed. Cir. 1983).

The rejection under §103 as upheld by the
Board was based on Nestle's British Patent
No. 1,571,156 and certain pages of Volume I
of M. Sivetz & H. Foote, *Coffee Processing*
Technology [hereinafter cited as Sivetz]. The
Board also referred to Epstein U.S. Patent No.
2,783,149.

The British patent describes the several
steps of the disclosed process, including
prewetting outside the extractor column, ex-
cept for the requirement that oxygen be ex-
cluded during the two steps of prewetting and
transfer. The Sivetz book was relied on for its
teaching that "the most important factors af-
fecting roast coffee shelf life are oxygen and
moisture." The Epstein patent teaches the
extraction of coffee using carbonated cold wa-
ter, which "eliminates the oxidative action of
atmospheric air and prevents deterioration of
the coffee".

Margolis argues that although prewetting
of the ground coffee is not new, it was consid-
ered disadvantageous to the flavor of the final
product. Margolis cites the Sivetz book for its
teaching that prewetting outside the extractor
column "is bad because it causes staling of
ground coffee in less than an hour, accompa-
nied by a heavy undesirable flavor". Margolis
asserts that he avoids these expected disadvan-

tages by excluding oxygen in both the prewet-
ting and transfer stages, and that neither his
procedure, nor the advantages he achieves, is
reported in an otherwise extensive prior art.

As evidence of his unexpected results, Mar-
golus points to the data in the specification
comparing coffee produced by his process with
that produced without removal of oxygen, as
follows:

Samples of instant coffee prepared ac-
cording to a conventional method without
pre-wetting (I), with pre-wetting in the
percolator (II), according to Examples 1
(III) and 5 (IV), were evaluated by a panel
of trained tasters. Their comments are sum-
marized below.

Sample	Comments
I	Full, balanced but with artificial acidity, process taste, instant cof- fee flavour
II	Full but with grounds flavour, cereal flavour, baggy taste
III	Full, balanced, clean, natural, neutral
IV	Full, balanced, aromatic, fresh, filter coffee flavour

The Examiner and the Board refused to
consider this evidence, giving the reason that
Margolis' Examples 1-6 in the specification
do not recite that they were conducted in the
absence of oxygen. Thus the Board held that
"[w]e are apprised of no evidence showing that
appellants obtained any unexpected results",
and rejected the claims for obviousness in view
of the prior art.

Margolis takes issues with the Board's read-
ing of the specification. Margolis argues that
the purpose of the specification is to describe
and illustrate the claimed invention, and char-
acterizes the Board's reading of the disclosure
as "contrary to logic, reason, and the text of the
specification". He points to various statements
in the specification:

According to the invention the process com-
prises wetting, in the absence of oxygen . . .
transferring the wetted coffee, out of contact
with oxygen. . . .

and immediately preceding the examples:

The following examples are given for the
purposes of illustrating the process accord-
ing to the invention.

[1] We agree with Margolis that the
Board's position is in error. It is plain that the
examples illustrate Margolis' invention.

The specific examples provided the basis for
the comparative data tabulated *supra*. The
Board had not commented on the probative

value of these data, in view of its criticism of the examples. Neither had the Examiner. The data which compare the products of examples 1 and 5 with conventional instant coffee must be considered in reaching a conclusion as to whether the claimed invention as a whole would have been obvious. Neither the prior art, nor the comparative data, is properly considered alone.

It is the entire body of evidence, that arising in the prior art and that provided by the applicant, which must be weighed in the first instance by the PTO. Because the Board did not consider Märgolis' comparative data, the record before us is insufficient. 35 U.S.C. §144. To enable these further proceedings before the PTO, the decision of the Board is vacated and the case is remanded.

The Commissioner in his brief presented certain new arguments on this appeal, relying on references that had been before the Examiner, but raising objections under 35 U.S.C. §102 and §103 that had not been appealed to or relied upon by the Board. In the interest of an orderly and fair administrative process, it is inappropriate for this court to consider rejections that had not been considered by or relied upon by the Board. *In re Hedges*, No. 85-2524, slip op. at 3, 228 USPQ at 685 (Fed. Cir. Feb. 12, 1986); *In re Hounsfield*, 699 F.2d 1320, 1324, 216 USPQ 1045, 1048-49 (Fed. Cir. 1983).

VACATED AND REMANDED

District Court, W.D. Pennsylvania

Rodgers, et al. v. Eighty Four Lumber Company

Nos. 84-828 and 84-1114

Decided September 24 and December 11, 1985

COPYRIGHTS

1. Infringement — In general (§24.201)

17 USC 110(5) provides no exemption from copyright infringement liability for lumber store chain's playing of copyrighted music for primary purpose of muffling industrial noise for benefit of employees, rather than to attract public to stores, since purpose for which music was used is irrelevant to question of infringement.

Consolidated actions by Dorothy F. Rogers, et al., Jonico Music, et al., and Harrison Music Center, et al., against Eighty Four Music Company, for copyright infringement. Judgment for plaintiffs.

Kevin C. Abbott, John W. Eichleay, Jr., and Thorp, Reed & Armstrong, all of Pittsburgh, Pa., for plaintiffs.

Daniel J. Weis, and Weis & Weis, both of Pittsburgh, Pa., for defendant.

Weber, District Judge.

Opinion
September 24, 1985

Plaintiffs in these consolidated actions are the registered holders of copyrights and are all members of the American Society of Composers, Authors and Publishers (ASCAP), which has a non-exclusive right to license non-dramatic performances of its members' copyrighted compositions. Plaintiffs have filed three separate actions alleging 49 counts of willful copyright infringement by defendant in five of Eighty Four Lumber Company's stores, in New York, Illinois, Alabama, California and Texas, and seek a permanent injunction against further infringement, an award of statutory damages for each infringement and an award of costs and reasonable attorneys' fees. Plaintiffs now move for summary judgment and have filed evidentiary material and brief in support thereof. Defendant has opposed plaintiffs' motion with evidentiary material and brief.

Summary judgment would be available in a copyright infringement action where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *Sailor Music v. The Gap Stores, Inc.*, 516 F.Supp. 923, 213 USPQ 1089 (S.D.N.Y. 1981), *aff'd* 668 F.2d 84 (2d Cir. 1981), *cert. denied* 456 U.S. 945 (1982). We believe that there is no genuine issue of fact as to liability in this action, and that defendant is liable as a matter of law. The following discussion indicates the basis for our decision to grant in part plaintiffs' motion for summary judgment.

There is no material issue regarding the fact that defendant Eighty Four performed the musical compositions listed in plaintiffs' complaints by transmitting the radio broadcasts over multiple speakers in the five stores specified. Plaintiffs have produced affidavits in support of these facts which are undisputed by defendant.